FILED
MAY 14 2007
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SUPREME COURT, U.S.

No. 06-1383

IN THE

Supreme Court of the United States

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION and
GADSDEN INDUSTRIAL PARK, LLC,

Petitioners,

v.

GULF STATES REORGANIZATION GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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LIST OF PARTIES

Petitioners' list of parties was set forth at page *ii* of their Petition for Writ of Certiorari, and there were no amendments to that statement.

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for Writ of Certiorari, and there were no amendments to that statement.

RESPONDENT'S OPPOSITION ONLY CONFIRMS THE NEED FOR CERTIORARI

Respondent's Brief in Opposition ("BIO") simply reiterates the Eleventh Circuit's misconstructions of federal antitrust law and, in so doing, reemphasizes the need for a grant of certiorari to set those errors aside.

First, Respondent seeks unsuccessfully to distinguish this Court's recent decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007). Recognizing, as the District Court confirmed on a full factual record, that neither "[p]redatory bidding" nor any other exclusionary conduct in the bankruptcy auction could be established, Respondent reiterates the Eleventh Circuit's conclusion that Respondent's consequential alleged inability to enter the hot rolled coil market still suffices to sustain a Sherman Act § 2 violation. BIO 2, 5. In Respondent's view, *Weyerhaeuser* has significance only where predatory bidding is alleged. *Id.* This contention misstates the Court's analysis in *Weyerhaeuser* and is completely at odds with the rationale of a series of decisions, including *Weyerhaeuser*, which have elucidated the proper basis of liability in Sherman Act § 2 cases.

The plaintiff in *Weyerhaeuser* claimed that Weyerhaeuser drove it out of the lumber business by bidding up input costs and making it economically impossible for plaintiff to acquire the alder logs it needed to stay in business. Had this Court accepted the interpretation of Sherman Act § 2 espoused by Respondent and the Eleventh Circuit, it would have been required to sustain the decision below because plaintiff was clearly excluded from the downstream lumber market by defendant's actions. Instead, this Court reversed because the conduct of Weyerhaeuser giving rise to plaintiff's exclusion, while undoubtedly injurious to plaintiff, could not be shown to be anticompetitive. 127 S. Ct. at 1077-78. In so doing, the

Court adhered to a continuing line of authority recognizing that the proper Sherman Act § 2 analysis focuses on both the existence of market power and the means used to achieve or preserve that power. In those decisions, the Court has made clear that the antitrust laws were not designed to hamstring pro-competitive actions by dominant market participants even if those actions were adverse to the interests of their business rivals. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004).

The only means by which Respondent alleges that Petitioners excluded Respondent from the hot rolled coil market was lawful, admittedly non-predatory bidding for dormant steel mill assets in a Chapter 7 bankruptcy auction. As with input purchasing in *Weyerhaeuser*, such bidding is the "very essence of competition," 127 S. Ct. at 1077 (quoting *Brooke Group Ltd.*, 509 U.S. at 226), as well as a vital element of the Chapter 7 bankruptcy process. It should be condemned only if demonstrably conducted in a predatory manner – *i.e.*, in a manner that can only be explained by the benefit of foreclosing a potential rival's access to the inputs necessary to compete.[1] Here the record, as carefully evaluated

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[1] Respondent's claim that the antitrust enforcement authorities "assert their jurisdiction over the parties to a bankruptcy auction in appropriate situations," BIO 5, n.2, is premised solely on merger enforcement involving the acquisition of assets from a Chapter 11 debtor in possession that remains a going concern. Respondent simply ignores the critical distinction between the Chapter 7 asset liquidation proceeding two years after shut down at issue here and a Chapter 11 reorganization. *See* Pet. 12-16. In any event, the issue is not whether activities in a Chapter 7 auction are somehow immune from antitrust scrutiny. Rather, the Court is asked to focus on the types of bankruptcy auction conduct necessary to sustain an allegation of Sherman Act § 2 liability.

by the District Court, undisputedly showed that Petitioners had ample pro-competitive reasons to participate in the bankruptcy auction and arbitrage the dormant assets into a more favorable foreign asset market. The teaching of *Weyerhaeuser* with respect to the evaluation of input purchasing by an alleged monopolist with the effect of excluding an actual or potential competitor from the market is clearly applicable to Petitioners' activities, thus requiring reversal or, at a minimum, a remand for further proceedings not inconsistent with *Weyerhaeuser*.

Second, Respondent seeks to avoid consideration of the Eleventh Circuit's confusion of "but for" and "proximate" causation by contending that the Eleventh Circuit found "causation *by any standard*." BIO 7. Respondent's only support for this proposition is that the Eleventh Circuit talismanically recited in a conclusory footnote that it had found "proximate cause." BIO 6; *see* App. 12a n.6. In fact, the Eleventh Circuit gave no consideration to the District Court's careful exposition of "superseding cause" as required by better reasoned antitrust precedent and this Court's decision in *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 832 (1996). The only fair, and eminently reversible, reading of the Eleventh Circuit's decision is that it wrongly equated the more stringent "by reason of" requirement of Clayton Act § 4 with the minimal constitutional "but for" standing requirement of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[2] Such a precedent that should not be allowed to stand.

Third, Respondent essentially ignores the question of whether the injury it allegedly sustained by being

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[2] *See* App. 5a (applying minimal "causal connection" test for constitutional standing from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); 6a (acknowledging application of only the "general standing" and "causations-in-fact" requirements that apply to all plaintiffs in federal court, rather than the Clayton Act § 4 standard that governs private antitrust actions).

competitively ousted from a below-market acquisition opportunity can be deemed an "antitrust injury" under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Respondent simply claims that the alleged "effect of Nucor's conduct on the market for steel production" is all "that mattered for the purpose of antitrust analysis." BIO 7. Respondent, however, was never in "the market for steel production" either as a seller or buyer. Rather, Respondent's alleged injury arose only in the bidding process for dormant capital assets and, as the Petition established, in no way could be attributed to Nucor's alleged market power as opposed to Petitioners' accurate, procompetitive perception of arbitrage values. This Court should take the opportunity presented by this case to establish that "antitrust injury" can arise in Sherman Act § 2 cases only when a plaintiff is harmed by otherwise irrational business conduct attributable to a motive of attaining or protecting market power. Where, as here, the alleged injury arises from pro-competitive recognition of an opportunity to put dormant assets to their highest and best use,[3] the Court should clarify that it cannot qualify as "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp.*, 429 U.S. at 489.

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[3] The District Court allowed full discovery with respect to Petitioners' motivation for entering the bankruptcy auction and determined that "Nucor and Casey are guilty of nothing more than attempting to make a profit by buying low and selling high in the market for used capital assets." App. 51a.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, this Court should grant the Petition for writ of certiorari.

Respectfully submitted,

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